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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-565

LOCAL UNION NO. 513 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner,

v.

EDWARD L. VANDEVENTER, JR.,
Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

EDWARD L. VENDEVENTER, JR., your Respondent prays that Petitioner's Petition for a writ of certiorari to issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on July 5, 1978 be denied.

QUESTIONS PRESENTED

Respondent, a member of Petitioner labor organization, alleged in his complaint a violation of Section 101 (a)(5) of the Labor-Management Reporting and Disclosure Act [herein referred to as LMRDA] in that Petitioner disciplined Respondent for his intra-union political activities and that the disciplinary action was taken without first giving Respondent a full and fair hearing as required by the LMRDA.

Petitioner maintained a hiring hall system for referring applicants for employment to employers requesting employees. The referral system was maintained pursuant to a collective bargaining agreement between Petitioner and various employers. Respondent's complaint alleged that the disciplinary action taken against him by Petitioner took the form of not referring him to jobs to which he should have been referred.

Jurisdiction was invoked by Respondent in his complaint in the District Court under Section 102 of the LMRDA, 29 U.S.C. 412.

Petitioner moved the District Court for dismissal of the complaint on the ground that the matter complained of by Respondent constituted an unfair labor practice under Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158 (b) and was within the sole and exclusive jurisdiction of the National Labor Relations Board. The District Court denied Petitioner's motion and held a trial by jury. The jury returned a verdict in favor of Respondent, and the District Court entered judgment thereon for compensatory damages and punitive damages. The United State Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court holding that Respondent's complaint stated a violation of Section 101 (a)(5) of LMRDA and that Congress under Section 102 of LMRDA conferred on

persons aggrieved by a violation of Section 101 (a)(5) of LMRDA the right to bring suit in a federal district court. The court below further found that even though the disciplinary action complained of took the form of discrimination in employment which is, under Section 8 (b)(1) and (2) of the LMRA, an unfair labor practice, this did not confer exclusive jurisdiction to the NLRB. The Court concluded that Congress had provided the federal courts and the NLRB with concurrent jurisdiction in such circumstances. The questions presented are:

1. Whether the Court below erred in holding that the national labor policy as enunciated by the Congress permits federal courts to exercise concurrent jurisdiction with the National Labor Relations Board over a cause of action based on the failure to provide a union member with a full and fair hearing prior to taking disciplinary action which action resulted in discrimination in employment.

2. Whether the Court below erred in holding that a complaint alleging the denial of a full and fair hearing prior to taking disciplinary action which action resulted in discrimination in employment is subject both to the jurisdiction of the National Labor Relations Board and to the jurisdiction of the federal courts under Labor-Management Reporting and Disclosure Act and that the complainant may elect the forum for adjudication.

PERTINENT STATUTORY PROVISIONS

The statutory provisions relevant to the consideration of this cause are:

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411 (a)(5):

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-

payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 412:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Section 8 (b)(1) and (2) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 158 (b)(1) and (2):

> b) It shall be an unfair labor practice for a labor organization or its agents——
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT

A. **The Facts**

Respondent has been a member of petitioner since 1963 and is qualified to operate certain types of construction equipment (R.59-60). Respondent had actively engaged in campaigning on behalf of candidates for union office during the summer of 1974. The candidates supported by Respondent were defeated in the election which was held in August, 1974. On May 25, 1976, Respondent filed a complaint in the Federal District Court alleging a violation of Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (LMRDA) by the Petitioner when it took disciplinary action against Respondent for his intra-union political activities without first affording him a full and fair hearing. Respondent alleged that the disciplinary action taken by Petitioner resulted in Respondent being denied jobs he should have been given.

B. **The Judgment of the District Court**

Petitioner moved for dismissal of the complaint in the District Court on the ground, inter alia, that the subject matter thereof was within the exclusive jurisdiction of the National Labor Relations Board. (R. 8-9). The District Court on October 10, 1976 denied the motion for dismissal (R. 10-18). Petitioner filed an answer reasserting its denial of jurisdiction. (R. 18-20).

Trial by jury was held in the District Court commencing on February 28, 1977 and on March 2, 1977, the jury returned a verdict in favor of Respondent in the sum of $25,000 actual damages and $10,000 as punitive damages. (R. 278). Petitioner, by oral motions at the close of Respondent's case in chief and

again at the close of all the evidence, moved that Petitioner be granted a directed verdict in its favor and that the complaint be dismissed for want of jurisdiction. The motions were taken under submission by the District Court and were denied. Judgment was entered on March 2, 1977 (Petitioner's App. C, page A-16).

Petitioner filed its motion for judgment not withstanding the verdict or, in the alternative, for a new trial on March 7, 1977. The motion was denied without opinion on April 13, 1977 (R. 27).

C. **Holding Below**

The Court below held that Congress intended that the federal courts have jurisdiction under the Labor-Management Reporting and Disclosure Act over instances where disciplinary action is taken by a union against a member without first affording the member a full and fair hearing. The court further held that in an instance where the disciplinary action takes the form of discrimination in employment referrals, an unfair labor practice, then the NLRB would also have concurrent jurisdiction with the federal district court.

The Court below affirmed the judgment of the District Court on July 5, 1978. (Petitioner's App. A, A-1, A-13).[1]

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[1] A Cross Appeal was filed by Respondent concerning the denial by the District Court of his motion for attorney's fees. The Court below reversed and remanded that matter.

REASONS FOR DENYING WRIT

Respondent's complaint is founded upon a violation of a right granted union members by Congress, the right to a fair and full hearing before the member may be disciplined. Sec. 101 (a)(5) of the Labor-Management Reporting and Disclosure Act [LMRDA] 29 U.S.C. 411(a)(5). If a Union denies a member this right and proceeds to discipline him, Congress has said that he may seek to redress his grievance by filing suit in a federal district court for his damages. Sec. 102 LMRDA; 29 U.S.C. 412.

The Respondent, believing that he had been disciplined by his union for certain intra-union political activities and that his right to a hearing had been denied him sued in Federal District Court for damages. His damages consisted of lost wages and lost fringe benefits because the method of discipline selected by the union was the denial of jobs to which he should have been assigned.

The Petitioner has asserted that because the disciplinary action took the form of discrimination in job assignments, an unfair labor practice, Respondent's exclusive forum is the NLRB.

Respondent did not base his complaint on discrimination in job referrals, as Petitioner has erroneously and repeatedly asserted; he based it on being disciplined by his union without a fair hearing.[2]

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[2] Plaintiff's Complaint:

Paragraph 5. Beginning on or about September 6, 1974, Defendant took disciplinary action cagainst Plaintiff which disciplinary action consisted of Defendant not referring Plaintiff to jobs to which he should have been referred.

Paragraph 6. Defendant failed to serve Plaintiff with written specific charges to give Plaintiff a reasonable time to prepare his defense and to afford Plaintiff a full and fair hearing prior to the taking the aforesaid disciplinary action all in violation of Title 29 of the U. S. Code, Section 411 (a)(5).

Congress specifically provided Respondent with direct access to the Federal Courts in such an instance and the question of NLRB preemption was laid to rest by the Supreme Court in *International Board of Boilermakers v. Hardeman*, 1971, 401 U.S. 233, 91 S.Ct. 609, 28 L.Ed2d 10. The Court held that where a complaint is founded on a denial of a fair hearing as required by 29 USC 411, then the aggrieved may apply to the federal courts for a remedy.

This court gave two primary reasons for its holding. First, fairness of an internal disciplinary proceeding is not a question beyond the conventional experience of judges nor does it raise issues within the special competence of the NLRB. Second, Sec. 102 of the LMRDA expressly provides for Federal District Court jurisdiction for violations of Sec. 101(a)(5) of the LMRDA.

The Eighth Circuit Court of Appeals in reviewing Petitioner's assertion correctly concluded that Congress explicitly intended to give union members direct access to the federal courts when unions abused certain rights of members including disciplining them without a hearing.

The Court of Appeals rejected the Petitioner's argument that where the discipline takes the form of discrimination in job referrals, an unfair labor practice, the union member must direct his plea to the NLRB. The Court of Appeals found that Congress, under these circumstances has given the NLRB concurrent jurisdiction with the federal courts. The court held (App. A-6):

> "We reject the Union's argument for it misconstrues both the preemption doctrine and the LMRDA. The purpose of the preemption doctrine is to protect a uniform national labor relations policy from interference by state and federal courts. *San Diego Building Trades Council v. Garmon*, supra, 359 U.S. at 241-48. That national policy is established in the first instance by Congress. The preemption doctrine therefore rests on congressional intent. See *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, No. 76-750, slip op. at 7 n. 12 (U.S. May 15, 1978). Congress may originally have intended that the NLRB exercise exclusive jurisdiction over charges of discrimination in job referrals, whether for discipline or other purposes. In enacting the LMRDA in 1959, however, Congress expressed a clear intention to grant federal courts jurisdiction over claims of improper union discipline of members, thereby superseding the exclusive jurisdiction of the NLRB. Cf. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, No. 76-750, slip op. at 8 n. 14 (Congress has created numerous exceptions to the Board's exclusive jurisdiction). Thus, the grant of federal court jurisdiction contained in 29 U.S.C. § 412 overrides the preemption doctrine. See *Beaird and Player, Union Discipline of Its Membership Under Section 101 (a) (5) of the Landrum-Griffin: What is "Discipline" and How Much Process is Due?* 9 Ga. L.Rev. 383, 385-86 (1975); *Etelson and Smith, Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L.Rev. 727, 754-55 (1969)."

The Respondent relies heavily on the recent case of *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290. In that case *Farmer* sued his union in a California state court on a tort theory claiming that his union caused him grievous emotional distress by not referring him to jobs due to his union political activities. The Supreme Court held that while the plaintiff in *Farmer* could maintain a tort action against his union and can bring in evidence of discrimination in job referrals, this discrimination cannot form the underlying basis for the claim and since an appropriate jury instruction was not given to make this clear, a new trial should be granted the union.

The *Farmer* case is distinguishable from the case at bar in several particulars. First, Plaintiff's underlying claim is not employment discrimination, it is the denial of a fair and full hearing prior to taking disciplinary action. Second, the jury was clearly instructed by the court, in the case at bar, that the only way it could return a verdict for Respondent was to find that he had been disciplined for union activities without first being afforded a fair hearing. (R. 304-305 and 308) In fact, the only mention of employment discrimination in the instructions was when the court defined the nature of the disciplinary action taken against the Respondent. (R. 304). It is interesting to note that this instruction was offered by the Petitioner (Petitioner's proposed instructions D). Surely, the Petitioner cannot now be heard to complain that Respondent's verdict should be reversed because of an instruction offered by the Petitioner. Third, the Respondent's cause of action is based on a federal statute, the violation of which gives the district court and not the NLRB, jurisdiction over the matter. As the court in *Farmer* emphasized in a footnote, Congress may establish exceptions to the NLRB's jurisdiction. The Court said:

> "In addition to the judicially developed exceptions referred to in the text, Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases." (Footnote 8).

Significantly of all, *Farmer* does not even mention the *Hardeman* case either to distinguish it or overrule it, thus clearly demonstrating that *Farmer*, while being applicable to questions of pre-emption that may arise out of violations of state laws has no applicability whatsoever to actions founded upon §§ 101 and 102 LMRDA, 29 USC 411 and 412.

The clear unequivocal holding of the Supreme Court in *Hardeman* remains, after *Farmer*, totally intact. Nothing could be more explicit than the following from *Hardeman* (at U.S. p. 241 and L. Ed. pp. 8 and 9):

> "As we have said, the critical question in this action is whether Hardeman was afforded the rights guaranteed him by Section 101 (a)(5) of the LMRDA. If he was denied them, Congress has said that he is entitled to damages for the consequences of that denial."

CONCLUSION

The issues presented for review are settled law. The judgment of the Court of Appeals conforms to this law and does not create any conflict between circuits. The Opinion carries forward the intent of Congress and assists in the development of a sound body of federal labor law.

Respondent respectfully submits that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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